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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CLARENCE CATER et al.,<br>Defendants and Appellants. | A146678<br><br>(Contra Costa County<br>Super. Ct. No. 051314053) |

This is a joint appeal by two codefendants, Clarence Cater and Ohmad Burks, convicted by a jury of murder, robbery and shooting at an occupied vehicle. Numerous sentencing enhancements were found true, including, as to Cater only, two special circumstances.

On appeal, defendants raise hearsay and confrontation clause challenges to the trial court's admission of gang-related testimony offered by two prosecution experts. Burks individually challenges the admission of certain reputation or opinion testimony offered by three lay witnesses regarding his gang leadership role.

In addition, defendants challenge the jury instruction as to count three, shooting at an occupied vehicle, alleging it failed to instruct correctly on the "intent" element of this offense.

Cater challenges (1) the jury's finding of felony-murder special circumstance contending that substantial evidence did not prove he harbored an intent to commit

robbery; and (2) the constitutionality of the special circumstance statute, Penal Code section 190.2, subdivision (a)(17)(A).[1]

Finally, in supplemental briefing, defendants contend the amendment of section 12022.53, subdivision (h) requires remand to permit the trial court to exercise its discretion to strike or dismiss the sentencing enhancements. Burks alone contends that changes in California law, including amendment of section 3051, require remand of his case to permit him to make an adequate record of youth-related factors in anticipation of his eventual youth offender parole hearing. We remand these matters to the trial court for resentencing of both defendants in light of these statutory amendments. In all other respects, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On May 7, 2015, an information was filed charging defendants with murder (§ 187) (count one), second degree robbery (§§ 211, 212.5) (count two), and shooting at an occupied vehicle (§ 246) (count three). In addition, the information alleged gang and weapon enhancements (§§ 186.22, subd. (b)(1), 12022.53, subds. (b)–(e)), as well as felony-murder and gang-related special circumstances (§ 190.2, subd. (a)(17) & (22)). These special circumstance allegations were subsequently dismissed by the trial court as to Burks only.

As revealed at trial, Burks was a founding member with his brothers of a rap group called "Knockin' Niggas Instantly," or "KNI." Burks used the KNI moniker of "Poo" or "Pooh." KNI soon morphed into a criminal street gang, with its members engaging in crimes including robbery and assault. Young gang members were known as "baby KNI," and members' girlfriends were known as "Knockin' Bitches Instantly," or "KBI." Cater and J.E. (a minor at the time of the charged crimes) were also KNI members, with Cater using the moniker "Kayta."

On September 7, 2012, Dayvon George and his brother W.G. (collectively, the brothers) were at Buchanan Park in Pittsburg filming a music video for their rap group,

[1] All undesignated statutory citations are to the Penal Code.

MIA Boys (MIA). Music video producer T.L. had posted an open invitation to the video shoot on social media, and a group of people had gathered, including several children who planned to be in the video. Although MIA was not a gang, it had conflicts in the past with KNI. In particular, just a few weeks prior, the brothers and KNI had a confrontation at a Chuck E. Cheese's restaurant after Dayvon confronted Cater and accused Cater of jumping him on a prior occasion. At the time, W.G. heard Cater yelling something about KNI.

Also present at Buchanan Park on September 7 were defendants, J.E., and Burks's off and on girlfriend, K.L. Earlier, a friend had driven Burks and K.L. to Antioch, where Burks obtained a gun from his brother. At about 4:00 p.m., Burks spoke by phone with J.E.'s mother, T.R., and told her he would be meeting up with J.E. shortly. T.R. then called J.E., who told his mother he would be at the park for a rap shoot. Burks and K.L. picked up Cater and J.E. on their way back to the park. Once there, the group talked about MIA, with Burks telling K.L., "We about to handle something, stay up here." J.E. announced, "I'm about to just rob these niggas." Shortly after, at about 6:00 p.m., Cater, Burks and J.E. walked down the hill where they had congregated toward the parking lot where MIA was filming the music video.

After descending the hill, the three men confronted the brothers, with one of them asking, "Do you remember me?" T.L., the music producer, asked whether the men would like to join the video. Burks responded, "I ain't down here for none of that." The brothers and their friend B.D., who was also present, were concerned and tried to leave, prompting Burks to reveal the gun in his waistband and warn, "Don't do nothing stupid." According to B.D., someone said, "Don't get in the car or it's going to be bad." Burks then told B.D. not to try anything "funny" or he would "knock you down." At that point, W.G. or Dayvon had T.L. drive the children who were present away in his car.

Turning to J.E. and Cater, Burks then asked, "What y'all trying to do? Because I'm done talking." J.E. demanded that W.G. turn over his chain necklace and watch, which he did. Cater pulled out his gun, telling W.G. that he would shoot him and kill his

brother. Dayvon tried to swat the gun away. He then took off running as Cater began shooting.

Cater chased Dayvon and continued to fire shots, while Burks chased W.G. According to D.P., who was seated in his car in the parking lot waiting on his elderly mother, Cater fired at least three shots. D.P. looked up after hearing a "pop" and saw Dayvon run by followed by Cater, who was tracking Dayvon with his gun. D.P. then saw Cater point his gun in his direction and fire, at which point D.P.'s passenger window shattered. The window glass cut D.P.'s arm, causing a wound not requiring medical attention. Dayvon died in the parking lot shortly afterward from two gunshot wounds. A "very upset" witness on the scene "scream[ed] that his friend had been shot," saying "over and over again" that "KNI killed him . . . ."

After the shooting, Burks retreated from the parking lot back up the hill. Burks gave K.L. his gun, sweater and hat, which she took as she left the park. Burks then called A.F., mother to one of his children, who took him into her home. Burks and Cater "probably" spoke by phone. Cater then later arrived at A.F.'s house, requesting two bottles of water.

Six days later, Burks contacted the police and gave an interview. Initially, he denied having a gun at the park but later acknowledged having one. Burks also denied arriving at the park with J.E. and Cater.

Burks later testified at trial and several times contradicted his earlier statements to police. Burks denied that KNI was a criminal street gang and that he had planned to rob or kill the brothers. He also denied being friends with J.E. and claimed not to get along with Cater. He insisted that he accompanied the men to the parking lot at the park to keep them out of trouble; he did not know Cater had a gun. Nor did he know either man had a plan to kill or rob the brothers.

K.L. was also interviewed by the police and later testified at trial. Like Burks, K.L. first claimed Burks was unarmed and arrived separately at the park from Cater and J.E. She later acknowledged Burks had asked her to lie about the gun and told the police

where she had hidden it.[2] At trial, K.L. acknowledged Burks, Cater and J.E. were KNI gang members and that Burks was a KNI leader, Cater a junior member, and J.E. a "baby KNI." She described KNI as like a family, with its members looking out for each other.

On July 2, 2015, defendants were found guilty by jury of all charges, and all alleged enhancements and special circumstances were found true.

On October 16, 2015, the trial court sentenced Cater to a total prison term of life without possibility of parole plus 50 years. Burks was sentenced to a total term of 50 years to life in prison. These timely appeals followed.

**DISCUSSION**

Defendants, jointly or individually as indicated, raise the following arguments: (1) the trial court prejudicially erred by admitting hearsay testimony from two prosecution gang experts, Pittsburg Police Detective Josh Reddoch and Antioch Police Detective Kathleen Lopez (Burks and Cater); (2) the trial court prejudicially erred by admitting hearsay reputation evidence regarding Burks's leadership role in KNI from lay witnesses T.R. (J.E.'s mother), T.W.[3] and security guard A.P. (Burks); (3) insufficient evidence was presented to prove felony-murder special circumstance because the robbery of W.G. was merely incidental to Dayvon's murder (Cater); (4) cumulative error in the admission of evidence requires reversal (Burks); (5) the jury was incorrectly instructed, to defendants' prejudice, on the "intent" element of count three, shooting at an occupied vehicle (Burks and Cater); (6) the felony-murder special-circumstance statute, section 190.2, subdivision (a)(17), authorizes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the federal Constitution (Cater); and (7) remand for resentencing is required in light of legislative amendments, including

[2] Police later found six expended shell casings in A.F.'s closet that matched the brand and caliber of bullets inside Burks's gun (which was later recovered), along with other of Burks's belongings.

[3] T.W., age 15, testified under a grant of immunity and, at the time of trial, was in jail pending retrial on enhancement allegations in another case.

statutory changes relating to youth offenders and the exercise of judicial discretion with regard to sentencing enhancements (Burks and Cater). We address each claim below.

## I. Admission of Expert Testimony of Defendants' Involvement in a Gang

Defendants contend testimony from two prosecution gang experts, Detectives Reddoch and Lopez, improperly conveyed hearsay evidence in violation of their right of confrontation under the Sixth Amendment of the federal Constitution. In doing so, both defendants argue the erroneous admission of hearsay testimony from these expert witnesses requires reversal of the gang-related enhancements and, as to Cater, gang-related special circumstances, while only Burks contends this alleged error also requires reversal of his underlying convictions. The People respond that defendants forfeited their right to challenge most of this testimony, that most of it was admissible, and, in any event, there was no resulting prejudice. We address each contention below.

### A. Forfeiture

The People contend we need not reach this issue because defendants forfeited the right to raise it by failing to provide specific hearsay and confrontation clause objections at trial. Burks points out that the California Supreme Court has since clarified and limited when an expert can rely on hearsay evidence. As a result, the failure to have objected at trial is excusable. (See *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).) As the California Supreme Court has explained post-*Sanchez*: "The issue in *Sanchez* was whether an *expert* may properly relate to the jury out-of-court statements to explain the bases for the expert's opinion testimony. Pre-*Sanchez* law characterized such statements as nonhearsay, reasoning that 'matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth.' [Citations.] As such, a hearsay objection to such expert testimony would generally have been futile unless it was shown that the jury could not 'properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted.' (*Sanchez*, *supra*, 63 Cal.4th at p. 679.)" (*People v. Powell* (2018) 6 Cal.5th 136, 179–180.) This holding applies here, making the forfeiture rule inappropriate.

**B. No Prejudicial Error**

We begin with an overview of rules governing expert witness testimony. "While lay witnesses are allowed to testify only about matters within their personal knowledge (Evid. Code, § 702, subd. (a)), expert witnesses are given greater latitude. 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' (Evid. Code, § 720, subd. (a).) Generally, an expert may express an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (Evid. Code, § 801, subd. (a).) In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. . . . When giving such testimony, the expert often relates relevant principles or generalized information rather than reciting specific statements made by others." (*Sanchez*, *supra*, 63 Cal.4th at p. 675.)

In addition, "[t]he admission of expert testimony is governed not only by state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .' (U.S. Const., 6th Amend.) . . . ' "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*." ' [Citation.] 'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.' [Citation.]" (*Sanchez*, *supra*, 63 Cal.4th at pp. 679–680.)

Based on these principles, *Sanchez* adopted the following rule governing expert opinion testimony based on hearsay: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a

prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. omitted.)

For purposes of this rule, *Sanchez* deemed case-specific facts to be "those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Sanchez, supra*, 63 Cal.4th at p. 676.) According to defendants, the trial court violated these rules by permitting the prosecution gang experts to testify to case-specific facts based upon hearsay out-of-court statements, and then to rely upon the truth of these facts in forming their opinions.[4]

More specifically, Cater first challenges the admission of Detective Reddoch's testimony that Cater was a KNI gang member to the extent this testimony was not based on his personal knowledge, but rather on his out-of-court conversations with other (mostly unidentified) police officers and gang members; his and other officers' "contacts" with Cater, including Cater's arrests while with other gang members; hearsay information contained in police reports; and Cater's tattoos. In addition, Cater challenges Detective Lopez's testimony to the extent she relied upon hearsay information in police

[4] The trial court ruled that hearsay statements conveyed by the prosecution experts would be admissible unless collected in targeting investigation of a particular defendant (as opposed to KNI generally). The court explained: "So I'm not excluding every single incident where Mr. Burks is part of an investigation [into KNI]. The distinction is that he was the target of it." The court also gave limiting instructions per CALCRIM Nos. 303 and 1403 that the gang evidence was only admissible to evaluate the gang-related enhancements, defendants' motive or credibility, and the "facts and information relied on by an expert witness in reaching his or her opinion."

reports or on out-of-court conversations with others, including her testimony that KNI was involved in criminal activity in the area that included burglaries and assaults.

Similarly, Burks challenges Detective Reddoch's testimony that Burks was a founding member and leader of KNI to the extent it was based upon: Reddoch's out-of-court conversations with other police officers and unidentified gang members; Burks's own admissions; hearsay references in police reports; law enforcement "contacts" with Burks made in the presence of other gang members; photographs of Burks making "gang signs"; and a letter found in Burks's possession that, according to S.Y., contained "gang writing." Burks challenges Detective Lopez's testimony regarding Burks's alleged KNI leadership role and KNI's involvement in criminal activities like assault and burglary. He asserts this testimony is erroneously based on hearsay information in police reports and/or out-of-court conversations with others, including gang members and victims.

We agree with the People that little, if any, of this testimony conveyed inadmissible hearsay or violated defendants' confrontation rights. To the extent minimal errors occurred, we conclude none constitute reversible error.

First, with respect to Detective Reddoch's opinion that Cater was a KNI gang member, much of what he relied upon was either appropriate or corroborated by other evidence often many times over. Cater's gang-related tattoos were confirmed by photographic evidence, as well as by K.L., who testified that Cater's "BROS" and "673" tattoos were related to KNI. K.L. also told police Cater was a KNI gang member and that KNI was like "blood" or "family" to him. In addition, W.G. testified that, weeks before his brother's murder, he heard Cater yell "KNI" during an altercation at a Chuck E. Cheese's restaurant. Finally, Burks, who took the stand in his own defense and gave a statement to police, also acknowledged Cater "refer[red] to [himself]" as "KNI."

Defendant correctly points out that Detective Reddoch also referenced his out-of-court conversations with other officers and individuals, as well as information contained in police reports, and that the hearsay rule generally bars this type of evidence. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 585.) However, one of the "other officers" Detective Reddoch spoke to was Detective Lopez, who testified as a rebuttal witness, and was

subject to cross-examination thereby eliminating any confrontation clause problem. Reddoch also testified that K.L. was one of the three individuals who confirmed to him Cater was in KNI. K.L., like Detective Lopez, testified at trial and was subject to cross-examination.

In any event, given the admissible evidence we have just described regarding Cater's involvement with KNI, including his own tattoos and admissions from Burks and K.L., there is no basis for reversal whether we apply the standard for state error (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result]) or federal constitutional error (*Chapman v. California* (1967) 386 U.S. 18 [harmless beyond a reasonable doubt]).

We reach similar conclusions with respect to most of the challenged expert testimony regarding Burks's gang involvement. Detective Reddoch testified that someone told him Burks and his two brothers started KNI. This statement is hearsay. However, Burks told police during his pretrial interview the exact same thing, i.e., that Burks and his two brothers were KNI's original members. Burks's statement in this regard was played at trial for the jury. K.L. also testified the Burks brothers started KNI. Thus, there was extensive corroborating evidence of Reddoch's testimony.

Burks also faults Reddoch's testimony regarding a letter found in Burks's possession that S.Y. told Reddoch contained "gang writing." While Burks correctly notes that he was unable to cross-examine S.Y. at trial on this issue, he disregards the fact the letter was admitted into evidence without any defense objection and speaks for itself, notwithstanding S.Y.'s alleged out-of-court statement. In addition, a photograph of Burks displaying KNI "gang hand signs," was admitted into evidence, a ruling that has not been challenged, as well as Burks's own admission that he was involved in and started KNI.

While defendants correctly note that Detective Lopez was permitted to testify about KNI's involvement in criminal activity, the record is silent as to the source(s) of her information. At trial, defendants did not raise a hearsay objection to her testimony. As a result, the trial court never called upon Detective Lopez to provide a proper

foundation that would have revealed whether, for example, she may have been involved in investigating these crimes or in reviewing court records or some other admissible public record. In the absence of an adequate record, we decline to assume error.[5] (*People v. Nelson* (2012) 209 Cal.App.4th 698, 711; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1515, fn. 4.)

Moreover, as was the case with Cater's related challenge, even assuming for the sake of argument an error did occur, there is no basis for reversal given the wealth of admissible evidence we have just described regarding Burks's involvement with KNI, a criminal street gang. Insisting otherwise, Burks takes the position that KNI was a rap group, not a criminal street gang. However, there was compelling evidence to the contrary. A criminal street gang is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e) [which includes assault, robbery and burglary], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subds. (f), (e).) Here, we have already described undisputed evidence that KNI consisted of at least three members (Cater, Burks and J.E.) having common identifying hand signs and tattoos. Several witnesses, including K.L. and T.R., referred to KNI as a "gang." And Burks himself testified that people (1) "claiming KNI"

[5] Burks asserts that the prosecution had the burden of establishing the preliminary fact that the expert was also a percipient witness, citing Evidence Code sections 400 and 403, subdivision (a). While this may be true, it was defendants' responsibility to alert the trial court to the prosecution's failure to meet this burden with respect to the particular testimony under challenge in order to preserve the issue for review. (Evid. Code, § 353, subd. (a) ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].)

were committing robberies and assaults, (2) were getting KNI-related tattoos (like "BROS"), and (3) were "putting it out there like it's a gang . . . ."

Further, other witnesses described KNI's involvement in crimes, including K.L., who told police KNI members commit robberies, and T.W., who testified that he personally saw a KNI member commit assault. Detective Lopez testified without objection about the involvement of KNI members in criminal activity that included assault and burglary. In addition, corroborative evidence proved Burks squatted at a vacant home used by individuals selling narcotics that had been shot up several times and contained a dresser covered in "KNI squad" graffiti.

Finally, there was equally compelling, properly admitted evidence that Cater and Burks committed the charged felonies while actively involved in a criminal street gang, and did so "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1); accord, *Sanchez*, *supra*, 63 Cal.4th at p. 698 [to support a gang enhancement " 'the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period' "]; *People v. Mejia* (2012) 211 Cal.App.4th 586, 611 ["the elements of the gang-murder special circumstance: '[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang . . . and the murder was carried out to further the activities of the criminal street gang' "].)

The evidence reveals that defendants and J.E. were KNI members, and that J.E. had declared his intent to rob the victims shortly before the three men descended the hill and approached the victims while they were gathered at the park to shoot an MIA music video. KNI and Cater, in particular, had a conflict with MIA. In fact, W.G. testified that

he heard Cater yell "KNI" when the two groups quarreled at a local restaurant a few weeks before the murder. Burks admitted stopping the victims in the park, showing them he was armed with a gun, and then initiating the robbery by declaring he was done talking and asking, "What y'all trying to do?" Burks also threatened to "knock . . . down" B.D. and, after Cater shot and killed Dayvon, fled the scene. Afterward, a "very upset" eyewitness said "over and over again" that "KNI killed [his friend] . . . ."

For the reasons stated, we conclude there was a wealth of evidence that defendants committed felony murder while actively involved in a criminal street gang and in furtherance of the gang's criminal gang activity. As a result, we conclude beyond a reasonable doubt that defendants would not have obtained more favorable results at trial had the challenged hearsay testimony from Detectives Reddoch and Lopez been excluded. (*People v. Banks* (2014) 59 Cal.4th 1113, 1168.)

**II. Admission of Lay Witness Opinion Testimony**

Burks next contends the trial court abused its discretion by admitting lay opinion testimony from T.W. and T.R., as well as character testimony from A.P., that was based on hearsay evidence. He further contends this abuse of discretion violated his due process rights and requires reversal. We disagree.

We briefly review the rules regarding the admissibility of lay witness reputation and opinion testimony. " 'A lay witness may offer opinion testimony if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony.' ([Citation]; see Evid. Code, § 800.) 'By contrast, when a lay witness offers an opinion that goes beyond the facts the witness personally observed, it is held inadmissible.' [Citation.]" (*People v. Jones* (2017) 3 Cal.5th 583, 602.) At the same time, a lay witness may testify to an out-of-court statement if the statement is not offered to prove the truth of the matter stated. (Evid. Code, § 1200.) A lay witness may also testify regarding "a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated . . . ." (Evid. Code, § 1324.) Finally, "[t]he court may, and upon objection shall, exclude testimony in the form of an opinion that is

based in whole or in significant part on matter that is not a proper basis for such an opinion." (Evid. Code, § 803.) On appeal, we review the trial court's ruling on the matter for abuse of discretion. (*People v. Jones, supra*, 3 Cal.5th at p. 602.)

The trial court ruled that the testimony of T.W. and T.R. would be admitted for the limited purpose of showing the witnesses' belief or state of mind regarding Burks's leadership role in KNI so long as it was formed *before* the charged offense. T.R., J.E.'s mother and Burks's acquaintance and alleged sexual partner, testified she "hear[d]" that "everyone knows that [Burks] was a KNI leader . . . ." She also testified that Burks served as a mentor for J.E. and other "younger guys." T.W. testified that "everyone" at Antioch Middle School, where he used to be a student, "just knew" Burks was KNI's leader. While T.W. did not personally know Burks, he had attended school and been friends with other KNI gang members in the past. A.P., a private security guard at the housing complex where Burks lived, was permitted to testify that A.P. "believe[d] that [Burks] is a leader" of KNI based on Burks's reputation as such in the community and on Burks's interactions with other residents.

We agree with the trial court that T.W. and T.R. could testify to their general belief that Burks belonged to and was a leader of KNI to prove his or her state of mind as opposed to the truth of his or her statement. (*People v. Turner* (1994) 8 Cal.4th 137, 189 [out-of-court statement properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute.] As the People note, the jury was instructed that they were not to consider T.W.'s and T.R.'s statements regarding Burks's gang leadership for their truth, but for the nonhearsay purpose of showing their beliefs. We presume that the jury followed the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) In addition, their testimony was admissible to rebut Burks's trial testimony that he was not friends with T.R.'s son, J.E., and that KNI meant "[n]othing really" to him.

We further agree that, as a rebuttal witness who spent 90 percent of his time as a security guard on the streets where Burks lived, A.P. could properly opine about Burks's

reputation as a gang leader in order to rebut Burks's trial testimony that KNI was merely a rap group that meant nothing to him. (See Evid. Code, § 1102; *People v. Wagner* (1975) 13 Cal.3d 612, 618 ["when the defendant . . . has injected the issue of his . . . *character* into the case by direct testimony, the prosecution may rebut by introducing evidence of the defendant's bad moral character"].) "[T]he price a defendant must pay for attempting to prove his good name is to throw open a vast subject which the law has kept closed to shield him. (Evid. Code, §§ 1101, 1102.) The prosecution may pursue the inquiry with cross-examination as to the contents and extent of the hearsay upon which the opinion was based, and may disclose rumors, talk, and reports circulating in the community." (*People v. Eli* (1967) 66 Cal.2d 63, 78.)

In any event, the admission of this lay witness testimony regarding Burks's gang leadership caused no prejudice even if erroneous. As we have already discussed (*ante*, pp. 10–13) there was a wealth of admissible evidence relating to Burks's significant gang involvement. In light of this evidence, any admission of improper opinion or reputation testimony from these lay witnesses is harmless beyond a reasonable doubt. (*People v. Powell*, *supra*, 6 Cal.5th at p. 180 [where the evidence "already reflected defendant's significant gang involvement," any error in admitting reputation testimony from lay witness was harmless]; *People v. Banks*, *supra*, 59 Cal.4th at p. 1199 [improper reputation evidence harmless].)

**III. No Cumulative Error in the Admission of Evidence**

We likewise reject Burks's claim that reversal of the judgment is required on the basis of prejudice arising from cumulative errors in admitting improper evidence at trial. As discussed above, we have identified few errors during trial with respect to the trial court's evidentiary rulings, and no error that is prejudicial to him. Whether considered separately or together, we conclude the errors were harmless. (*People v. Gamache* (2010) 48 Cal.4th 347, 408.)

## IV. Substantial Evidence Supports the Jury's Finding of Felony-murder Special Circumstance

Cater challenges the jury's finding of felony-murder special circumstance on the ground that substantial evidence did not prove he had the intent to commit robbery. We disagree.

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [applying same standard to special circumstance findings].)

As relevant here, the felony-murder special circumstance in section 190.2, subdivision (a)(17) applies to murders "committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5."

As Cater notes, " 'if the felony is merely incidental to achieving the murder—the murder being the defendant's primary purpose—then the special circumstance is not present, but if the defendant has an "independent felonious purpose" (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present.' (*People v. Navarrete* (2003) 30 Cal.4th 458, 505 [133

Cal.Rptr.2d 89, 66 P.3d 1182]; see also *People v. Raley* [(1992)] 2 Cal.4th [870,] 903 ['Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance.'].)" (*People v. D'Arcy* (2010) 48 Cal.4th 257, 296–297; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 28 ["To prove a robbery-murder special circumstance, the prosecution must prove the defendant formed the intent to steal before or while killing the victim"].)

Having reviewed the record, we conclude there is substantial evidence that Dayvon's murder was "committed while [Cater] was . . . an accomplice in, the commission of . . . or the immediate flight after committing . . . [robbery]" as required for felony-murder special circumstance. (§ 190.2, subd. (a)(17).) On the day of the murder, Cater was standing with Burks and J.E. when J.E. announced, "I'm about to just rob these niggas." Upon hearing J.E.'s announcement, Cater came down the hill with Burks and J.E., where they confronted and surrounded the victims. At that point, Burks, who, like Cater, had a prior robbery conviction, initiated the violence, asking his accomplices, "What y'all trying to do? Because I'm done talking." While J.E. then demanded W.G.'s property, Cater pulled out his gun and warned W.G. he would shoot him and kill his brother. Cater then chased Dayvon after Dayvon attempted to swat his gun away, and Burks chased W.G. before all three men ultimately reunited and ran away from the parking lot back up the hill.

As these circumstances reflect, the robbery of W.G. was not "merely incidental" to the murder of Dayvon. (*People v. Rountree* (2013) 56 Cal.4th 823, 854.) Rather, the three men together approached the victims with the stated intent, vocalized by J.E., to commit robbery. Not only did this robbery come to fruition, the robbery victim's brother ended up dead. No further evidentiary showing was required to establish Cater's concurrent intents to rob and kill. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1129–1130 [substantial evidence of felony-murder special circumstance existed where, "[a]lthough [co-felon] testified that it was Garcia who demanded where 'it' [to wit, money or valuables] was, the jury could reasonably infer from all the testimony given by Zavala that the attackers coordinated their efforts in a joint plan to rob the brothers"];

*People v. Boyce* (2014) 59 Cal.4th 672, 696–698 [compelling evidence supported felony-murder special circumstance where "defendant and Willis entered the salon intending to commit a felony inside and that defendant shot York 'while . . . engaged in' (§ 190.2, subd. (a)(17)) the commission of burglary and robbery"].)

## V. Cater's Punishment Does Not Violate the Eighth Amendment

Cater also challenges the felony-murder special-circumstance finding on constitutional grounds. He contends the same facts relating to the prosecution's sole first degree murder theory of felony murder cannot both elevate the murder count to first degree *and* constitute a special circumstance because it would violate the Eighth Amendment ban on cruel and unusual punishment. Cater reasons that the Eighth Amendment has been interpreted to require a special circumstance to narrow the class of death-eligible defendants from the overall class of defendants found to have committed murder so as to reasonably justify imposition of a more severe sentence.

Cater's contention fails for two reasons. First, Cater did not contemporaneously object to the felony-murder special-circumstance punishment imposed by the trial court on Eighth Amendment grounds, thereby forfeiting his right to do so here. (*People v. Spreight* (2014) 227 Cal.App.4th 1229, 1247; *People v. Russell* (2010) 187 Cal.App.4th 981, 993.) Further, and of greater significance, our state's highest court has, in binding authority, held otherwise. (*People v. Gamache, supra,* 48 Cal.4th at pp.405–406 [in rejecting the defendant's constitutional challenge, held "the felony-murder special circumstance (§ 190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death"]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"].) We reject his argument and proceed to the next issue.

## VI. Shooting at an Occupied Vehicle (§ 246) Instruction

Section 246, the offense charged in count three, criminalizes "maliciously and willfully discharg[ing] a firearm at an . . . occupied motor vehicle." (§ 246.) "The elements of this offense are (1) acting willfully and maliciously, and (2) shooting at an

inhabited house [or occupied motor vehicle]. (See Judicial Council of Cal. Crim. Jury Instns. (2008) CALCRIM No. 965.)" (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.)

Defendants claim the trial court's reading of CALCRIM No. 965 as to this count was prejudicial error because it omitted an essential element of the offense—the requirement to prove Cater consciously disregarded the probability that his shot(s) would hit a prohibited target. Specifically, defendants argue the trial court erred by failing to instruct the jury that each defendant could be guilty of this section 246 offense (Cater as shooter and Burks as aider and abettor) only if: "(1) Cater consciously disregarded the probability that the shots he fired at Dayvon George would hit an occupied motor vehicle and (2) it was reasonably foreseeable to Burks if and when he aided and abetted [J.E.'s] robbery of [W.G.] that Cater would consciously disregard the probability of hitting an occupied motor vehicle while shooting at Dayvon." In a related argument, Burks contends in supplemental briefing that the trial court further erred by failing to sua sponte instruct the jury on the legal definition of "at" for purposes of the section 246 offense.

The governing standard of review is not in dispute. " 'The law imposes on a trial court the sua sponte duty to properly instruct the jury on the relevant law and, as such, requires the giving of a correct instruction regarding the intent necessary to commit the offense and the union between that intent and the defendant's act or conduct. [Citations.]' [Citation.] We independently assess whether instructions correctly state the law (*People v. Posey* (2004) 32 Cal.4th 193, 218 [8 Cal.Rptr.3d 551, 82 P.3d 755]), keeping in mind that 'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]' " (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1499.)

**A. The "Intent" Element**

Here, the trial court instructed the jury per CALCRIM No. 965 that, to return a guilty verdict on this count, the prosecution must prove beyond a reasonable doubt that: "1. A defendant willfully and maliciously shot a firearm; [¶] AND [¶] 2. A defendant shot the firearm at an occupied motor vehicle." The trial court further instructed that

"maliciously," in this context, means "the unlawful intent to disturb, defraud, annoy, or injure someone else." As defendants note, this instruction did not advise the jury that shooting at an occupied motor vehicle in violation of section 246 means shooting with knowledge that an occupied vehicle was in the line of fire or, in other words, shooting with "reckless" disregard for the "high probability" that a bullet might hit the vehicle. We find no error.

As an initial matter, defendants' argument ignores the "long-standing general rule . . . that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*People v. Rundle* (2008) 43 Cal.4th 76, 151, 145 ["Any lack of clarity regarding the [challenged instruction] is of the defendant's doing, and on appeal he cannot avail himself of his own inaction"], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 394.) As explained in the case law, "section 246 is a general intent crime. [Citations.] . . . As for all general intent crimes, the question is whether the defendant intended to do the proscribed act." (*People v. Jischke* (1996) 51 Cal.App.4th 552, 556.) "In other words, it is sufficient for a conviction if the defendant intentionally did that which the law declares to be a crime." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437–1438.) "In the words of the statute, section 246 is violated when a defendant intentionally discharges a firearm 'at . . . inhabited dwelling house, occupied building . . . .' " (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1356.)

Here, the trial court's instruction correctly identified both of these elements, including the "intent" element that the shooter must have acted maliciously and willfully when shooting at the occupied vehicle. Yet, undisputedly, defendants failed to request any clarification or modification of the version of CALCRIM No. 965 given to the jury. They cannot now argue on appeal that the trial court's instruction, otherwise correct in law, was too general or incomplete in their case. (*People v. Rundle*, *supra*, at p. 145; see also *People v. Guiuan* (1998) 18 Cal.4th 558, 570 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was

too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "].)

Notwithstanding defendants' forfeiture, the trial court's instruction correctly conveyed the mental state required to establish a section 246 offense. Our colleagues at the Fifth District Court of Appeal explained why this is true when considering an argument nearly identical to defendants' in the context of former section 12034, subdivision (c), a statute criminalizing shooting at a person from a moving vehicle that was modeled after section 246. (*People v. Hernandez, supra,* 181 Cal.App.4th at p. 1501.) The statutory elements of this offense, which are similar to section 246, were (1) acting willfully and maliciously, and (2) shooting from a motor vehicle at a person outside a motor vehicle. As our colleagues explained, "[t]he necessary intent of the shooter was conveyed through the requirement [in the jury instruction] that the firearm must have been discharged willfully and maliciously, terms that were defined for the jury." (*Ibid.*) There, as here, no additional instruction was required. (*Ibid.*)

Defendants' reliance on *People v. Overman*, *supra*, 126 Cal.App.4th 1344, 1355–1357 is unwarranted. There, the reviewing court approved the trial court's giving of the additional instruction that " '[i]f you conclude that the defendant was aware of the probability that some shots would hit the [occupied] building and that he was consciously indifferent to that result, that is . . . a sufficient intent to satisfy [section 246].' " (*Id.* at p. 1355). Contrary to defendants' suggestion, however, *Overman* did not hold that *failure* to give this additional instruction was prejudicial error. As a result, this case is inapposite.

For all these reasons, we reject defendants' contention that the trial court erred by omitting from the jury instructions the "intent" or "mental state" element of the section 246 offense.[6]

[6] Because we conclude the trial court properly instructed the jury as to the section 246 offense, we reject Cater's related contention that he received ineffective assistance of counsel based on the failure of his attorney to object to the instruction as given, or to request a clarifying instruction. A reasonably competent attorney acting as a

### B. Shooting "at" an Occupied Vehicle

In a slightly more nuanced argument, Burks insists the trial court had a sua sponte duty to define the term "at" for purposes of CALCRIM No. 965. We again disagree. "In the absence of a specific request, a court is not required to instruct the jury with respect to words or phrases that are commonly understood and not used in a technical or legal sense." (*People v. Navarrete*, *supra*, 30 Cal.4th at p. 503.) The term "at"—defined by the Oxford American Dictionary as "in the direction of, towards"—was sufficiently clear without further clarification because the statute does not assign any meaning to it aside from this commonly understood definition.

In any event, Burks fails to explain how clarification by the court was necessary or would have caused the jury to reach a different result in his case. Defendants' own authority, *People v. Overman*, rejected a defense argument, like this one, that juries must be instructed that the "intent" element of section 246 is satisfied only if the defendant shoots "directly" at the occupied target. As the court explained: "[The offense stated in] section 246 is not limited to shooting *directly* at an inhabited or occupied target. Rather, it proscribes shooting *either* directly at *or* in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it." (*Id*. at pp. 1355–1356; accord, *People v. White* (2014) 230 Cal.App.4th 305, 317 [" 'the statute does not require a specific intent to achieve a particular result (e.g., strike an inhabited or occupied target, kill or injure)' "]; *People v. Ramirez*, *supra*, 45 Cal.4th at p. 990 [section 246, unlike the lesser included offense of section 246.3, subdivision (a), "requires that an inhabited dwelling or other specified object be *within the defendant's firing range*," italics added].)

Applying this analysis here, we again find no error, much less prejudicial error. There is a wealth of evidence indicating defendant Cater fired his gun multiple times at a retreating Dayvon in conscious disregard of the probability that one or more of these

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diligent advocate could have recognized the propriety of the trial court's instruction and declined to interject. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

bullets would strike D.P.'s nearby parked vehicle. At the time, the parking lot at Buchanan Park was full of vehicles, with people regularly coming and going. Children were present. There is more than substantial evidence that Cater's firing range when gunning down Dayvon included D.P.'s occupied vehicle. (*People v. Ramirez, supra,* 45 Cal.4th at p. 990; accord, *People v. Phung* (2018) 25 Cal.App.5th 741, 761].)

We conclude the failure to give defendants' proposed additional and/or clarifying instructions on the legal elements of a section 246 offense, even if considered error, was harmless beyond a reasonable doubt. (See *People v. Peau* (2015) 236 Cal.App.4th 823, 830–831.)

## VII. Recent Amendments to Sentencing Laws Require Remand for Rehearing

Finally, defendants jointly ask this court to remand their cases in light of amended section 12022.53, subdivision (h), which became effective after their sentencing on January 1, 2018, in order to permit the trial court to exercise its discretion to strike or dismiss their section 12022.53 sentencing enhancements under section 1385. (Stats. 2017, ch. 682, § 2, No. 5B Deering's Adv. Legis. Service, pp. 432–434.) Additionally, Burks asks this court to remand his case as a result of changes to the law governing youth offenders, including the enactment of section 3051 effective January 1, 2014. He seeks to be able to make a record of any and all relevant "youth factors" in anticipation of his eventual youth offender parole hearing. (See *People v. Franklin* (2016) 63 Cal.4th 261, 284.) We agree and grant these requests, which the People do not oppose.

### A. Section 12022.53, Subdivision (h) (Stats. 2017, ch. 682, § 2)

Effective January 1, 2018, section 12022.53, subdivision (h) was amended to allow the trial court to exercise its discretion under section 1385 to strike or dismiss a section 12022.53 sentencing enhancement at the time of a defendant's sentencing or resentencing. In this case, sentencing occurred before this amendment took effect. Thus, under the prior version of the statute, the trial court imposed as to Cater a 25-years-to-life enhancement for personal use of a firearm in the commission of murder causing death (§ 12022.53, subd. (d)), a consecutive 20-year enhancement for personal use of a firearm

in the commission of shooting at an occupied vehicle (§ 12022.53, subd. (c)), and another enhancement that was stayed pursuant to section 654 for personal use of a firearm in the commission of robbery causing death (§ 12022.53, subd. (d)). As to Burks, the trial court imposed two concurrent 25-years-to-life enhancements for being a principal in the commission of murder and shooting at an occupied vehicle for the benefit of a criminal street gang where another principal personally used a firearm (§ 12022.53, subds. (c), (d) & (e)), as well as another enhancement that was stayed pursuant to section 654 for personal use of a firearm in the commission of robbery (§ 12022.53, subd. (d)).

Both parties agree the amended version of section 12022.53, subdivision (h) was intended to apply retroactively to a case, like this, where the defendant has been convicted but the judgment is not yet final pending appeal. We agree with this position: " '[W]hen a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature.' [Citation.] As the Supreme Court stated in [*In re*] *Estrada* [(1965) 63 Cal.2d 740], 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.' (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.)" (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.)

Here, "the amendment to subdivision (h) of Penal Code section 12022.53, which [took] effect before the judgment in this case [will be] final, necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must

presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply, which includes this case." (*People v. Woods*, *supra*, 19 Cal.App.5th at p. 1091.)

The trial court must be given the opportunity to exercise its newly afforded discretion to decide whether to strike or dismiss the firearm enhancements imposed in defendants' cases. We reverse and remand for the trial court to decide the fate of defendants' sentencing enhancements consistent with the current version of section 12022.53, subdivision (h).

**B. Section 3051 (Senate Bill No. 260, 2013-2014 Reg. Sess.)**

Finally, we agree Burks's case must also be remanded due to recent changes to California law governing youth offenders, given that he was 21 years old when he committed these crimes. As Burks points out, the Legislature added section 3051 effective January 1, 2014, to grant youth offenders the right to a hearing to make a record of information relevant to their eventual youth offender parole hearings as contemplated by sections 3051 and 4801. The California Supreme Court in *People v. Franklin*, *supra*, 63 Cal.4th 261, explained "[s]ection 3051 . . . effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (*Id*. at p. 281.) More specifically, "the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that [a defendant considered a youth offender] is [deemed to be] serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration."[7] (*Id*. at pp. 279–280; accord, § 4801, subd. (c) [requiring parole board to

[7] When *People v. Franklin* was decided, section 3051, subdivision (b) provided that defendants under age 23 at the time of their crimes were entitled to youth offender hearings. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 278.) Effective January 1, 2018, section 3051 was amended to afford the right to such hearings to defendants under age 25 when committing their crimes. (§ 3051, subd. (a)(1), as amended by Stats. 2017, ch. 684, § 1.5, No. 5B Deering's Adv. Legis. Service, pp. 449–451.) The "core recognition" underlying these legal changes "is that children are, as a class, 'constitutionally different from adults' due to 'distinctive attributes of youth' that 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' [Citation.]

"give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law"].)

"The statutory text [also] makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. . . . In addition, [former] section 3051, subdivision (i) says: 'The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of [this section] by July 1, 2015.' This provision would be meaningless if the statute did not apply to juvenile offenders already sentenced at the time of enactment." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 278, first two bracketed insertions added.)

Since it was unclear whether the defendant had sufficient opportunity to put on the record the kinds of relevant information described in sections 3051 and 4801, remand to the trial court was appropriate "for a determination of whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284.)

We agree with the parties that a record containing the kinds of relevant information described in sections 3051 and 4801 is lacking with respect to Burks. Pursuant to *People v. Franklin*, *supra*, 63 Cal.4th 261, we grant Burks's request to order a limited remand to permit him to make a record of relevant information for any future youth offender parole hearing.[8]

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Among these 'hallmark features' of youth are 'immaturity, impetuosity, and failure to appreciate risks and consequences,' as well as the capacity for growth and change." (*People v. Franklin*, *supra*, at p. 283.)

[8] Burks's request for judicial notice filed on February 14, 2019, is granted and has been considered by this court for the purposes of this opinion.

## DISPOSITION

The judgments are reversed and the matters remanded for resentencing in light of recent legislative amendments affecting: (1) the trial court's authority to strike or dismiss the sentencing enhancements imposed against defendants; and (2) the right of youth offenders to make a record of relevant evidence in anticipation of any future youth offender parole hearing. In all other regards, the judgments against codefendants Burks and Cater are affirmed.

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Wiseman, J.*

WE CONCUR:

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Siggins, P. J.

_____
Fujisaki, J.

A146678/*People v. Cater & People v. Burks*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.